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# Redefining Commonality for Consumer Class Actions under California Business and Professions Code Sections 17200 and 17500

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# **REDEFINING COMMONALITY FOR CONSUMER CLASS ACTIONS UNDER CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17200 AND 17500**

*Roxana Mehrfar\**

*This Note explores California's Unfair Competition Law and critiques how courts have applied the commonality requirement for class certification of Unfair Competition Law claims. In particular, this Note considers the Unfair Competition Law in light of the combined effects of Proposition 64's standing requirements and the California Supreme Court's decision in In re Tobacco II Cases, which limited the scope of Proposition 64. This Note also provides a general background of the liability standards for each prong of the Unfair Competition Law, examines the federal preemption defense, and proposes a new standard for commonality.*

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## I. INTRODUCTION

California's Unfair Competition Law (UCL) statutes, codified in Business and Professions Code sections 17200–17500, have an expansive history and have varied considerably in their application over the course of the last century. Originally, businesses predominantly used the UCL to allege unfair competition by their competitors.<sup>1</sup> While the statutes have always provided citizens with a private right of action and standing to bring UCL actions,<sup>2</sup> attorneys general and public prosecutors most commonly brought UCL actions until the 1990s.<sup>3</sup> Over time, private plaintiffs recognized the utility of the UCL's broad protections,<sup>4</sup> and the number of actions brought by private citizens spiked.<sup>5</sup>

During that time, a plaintiff could satisfy the UCL's standing requirements fairly easily.<sup>6</sup> A private citizen could bring a UCL action on behalf of the public without first demonstrating that he or the public had sustained any harm.<sup>7</sup> Upon a showing that a particular entity had engaged in unfair competition, anyone could bring an

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1. Sharon J. Arkin, *The Unfair Competition Law After Proposition 64: Changing the Consumer Protection Landscape*, 32 W. ST. U. L. REV. 155, 157 (2005) ("Historically, the law of unfair competition and of trademark infringement . . . was concerned primarily with wrongful conduct in commercial enterprises that resulted in business loss to another, ordinarily by the use of unfair means in drawing away customers from a competitor." (quoting *People ex rel. Mosk v. Nat'l Research Co. of Cal.*, 20 Cal. Rptr. 516, 520 (Ct. App. 1962))).

2. See Robert Carlin, *Chapter 17: Giving San Francisco a Leg to Stand On in UCL Actions*, 39 MCGEORGE L. REV. 392, 397 (2008).

3. Arkin, *supra* note 1, at 155.

4. Section 17203 was amended in 1992 to extend liability to any defendant who "engages, has engaged, or proposes to engage in unfair competition." 1992 Cal. Stat. 1707. This expanded the substantive scope of the UCL to would-be wrongdoers, in advance of their wrongful conduct. In addition to the substantive scope, the 1992 amendment also enlarged the geographic scope of the UCL by striking the requirement that any acts of unfair competition must happen within the state of California. The California Supreme Court has interpreted this change to mean that the UCL reaches out-of-state activity. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1097 (Cal. 1998) ("More recently, in 1992, the Legislature . . . amended section 17203 to expand the scope of injunctive relief to encompass past activity and out-of-state activity.").

5. Arkin, *supra* note 1, at 156 (providing a statistical analysis of the sharp increase in private-citizen actions, as compared to law-enforcement actions, between 1933 and 2004).

6. See JULIA B. STRICKLAND & LISA M. SIMONETTI, STROOCK & STROOCK & LAVAN LLP, 2007 OVERVIEW OF CALIFORNIA'S UNFAIR COMPETITION LAW AND CONSUMER LEGAL REMEDIES ACT 4 (2007), available at <http://www.stroock.com/SiteFiles/Pub488.pdf>.

7. See *Mass. Mut. Life Ins. Co. v. Superior Ct.*, 119 Cal. Rptr. 2d 190, 193 (Ct. App. 2002) ("California courts have repeatedly held that relief under the UCL is available without individualized proof of deception, reliance and injury."); see also Carlin, *supra* note 2, at 397 ("There was no need to demonstrate any harm on the part of the plaintiff or the public—only that the defendant had engaged in unfair competition.").

action—commonly referred to as a “private attorney general” action—on behalf of himself or the public at large.<sup>8</sup>

With private attorney general actions on the rise and businesses<sup>9</sup> publicizing the increased abuses<sup>10</sup> of the UCL, Californians—in an effort to curb the rise of successful representative actions without a showing of harm<sup>11</sup>—resoundingly passed Proposition 64 on the November 2, 2004 ballot.<sup>12</sup> In doing so, Californians imposed stricter standing requirements for UCL actions, most notably adding an “injury in fact” requirement and providing that all UCL claims must satisfy the procedural class action requirements of California’s class-action statute, section 382 of the California Code of Civil Procedure.<sup>13</sup>

However, the passage of Proposition 64 left some questions unanswered. First, it was unclear whether the newly adopted standing requirements would be applied retroactively to already-pending litigation. Second, it was unclear whether all class members or just the class representatives needed to satisfy the new standing requirements in a UCL class action. The California Supreme Court answered the second question in *In re Tobacco II Cases*<sup>14</sup> in May 2009<sup>15</sup> in what commentators lauded as a landmark victory for UCL

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8. See Carlin, *supra* note 2, at 396–97; Claudia Wrazel & Saskia Kim, *A Primer on Business & Professions Code Section 17200: California’s Unfair Competition Law*, CAL. STATE LEGISLATURE, 1 (Jan. 2003), <http://www.assembly.ca.gov/acs/committee/c15/publications/HearingReports/UCLbackground.doc>.

9. See, e.g., Dale Kasler, *Businesses Hail Prop. 64 Victory: Opponents Call It a Victory for Polluters and Scofflaws*, SACRAMENTO BEE, Nov. 4, 2004, at A8.

10. Prior to the passage of Proposition 64, one commonly cited abuse of the UCL was the Trevor Law Group’s practice of bringing suits against thousands of small automotive repair shops through a dummy plaintiff who had suffered no harm from the unfair business practices or false advertising of the defendants. See Carlin, *supra* note 2, at 396 n.48. The Trevor Law Group made it difficult for the defendants to organize a defense, in part due to their practice of naming tens of thousands of co-defendants. *Id.*

11. See CAL. SEC’Y OF STATE, CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 40 (2004) (positing that a vote in favor of Proposition 64 would eliminate “a loophole in California law that allows private lawyers to file frivolous lawsuits against small businesses even though they have no . . . evidence that anyone was damaged or misled,” and would “stop[] these shakedown lawsuits” and “help California’s economy recover”).

12. Proposition 64 passed with 59 percent of the vote. 2004 California General Election Statewide Ballot Measure Returns, CAL. SEC’Y OF STATE, <http://vote2004.sos.ca.gov/Returns/prop/00.htm>. (last visited Oct. 21, 2010).

13. CAL. BUS. & PROF. CODE § 17204 (West 2008). California Proposition 64 is now codified in scattered sections of section 17200 of the California Business and Professions Code.

14. 207 P.3d 20 (Cal. 2009).

15. *Id.* at 25.

plaintiffs.<sup>16</sup> *In re Tobacco II* established that for class actions alleging UCL violations, Proposition 64's standing requirements apply only to the class representative, and not to absent class members.<sup>17</sup>

This Note addresses the recent changes to California's UCL and the impact of *In re Tobacco II* on UCL litigation, specifically in the arena of consumer class actions. Part II uses the Auction Rate Preferred Securities (ARPS) freeze of 2008 to show how a modified definition of commonality better realizes the interests underlying California's UCL. Part III provides an overview of the UCL. It examines the purpose behind the law and presents the dominant prongs of the UCL. Within that discussion, this Note also examines federal preemption of state law and considers the California Supreme Court's opinion in *In re Farm Raised Salmon Cases*.<sup>18</sup>

Part IV discusses the mounting difficulty of gaining class certification because of amended section 17204's commonality requirements. In addition, Part IV considers the status quo in light of *In re Tobacco II* and the first post-*In re Tobacco II* case to reach the California Court of Appeal, *Morgan v. AT&T Wireless Services, Inc.*<sup>19</sup>

Part V concludes that the best remedy for the combined effects of Proposition 64 and recent case law is an increased willingness to broaden the California courts' definition of commonality. Therefore, Part VI proposes that when courts resolve the commonality issue, they should look more closely at the defendant's alleged misconduct rather than at differences in consumers' receipt of unfair, unlawful, or fraudulent products and business services.

## II. THE AUCTION RATE PREFERRED SECURITIES FREEZE AS EXEMPLAR

This Note's proposal is better illustrated by considering the 2008 ARPS freeze as an example of when a modified definition of commonality would better serve the interests underlying California's

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16. *Id.*; see Maura Dolan, *Class Action Against Big Tobacco Revived; State Top Court's 4-3 Decision Surprises Those Who Thought Prop. 64 Had Ended Consumer Lawsuits*, L.A. TIMES, May 19, 2009, at A4.

17. *In re Tobacco II*, 207 P.3d at 25.

18. 175 P.3d 1170 (Cal. 2008).

19. 99 Cal. Rptr. 3d 768 (Ct. App. 2009).

UCL. First, it is helpful to outline the background behind the 2008 ARPS freeze.

In early 2008, individual and institutional investors were safely purchasing instruments known as ARPS, which are auction-style, closed-end mutual funds with variable but relatively short maturity dates.<sup>20</sup> Banks reset the ARPS rates periodically,<sup>21</sup> and several brokerage firms actively promoted ARPS as having guaranteed liquidity.<sup>22</sup> Brokers touted ARPS with maturity dates as short as seven days as safe, highly liquid, and extremely accessible.<sup>23</sup> Essentially, some investors purchased ARPS to temporarily park money they needed for upcoming projects while earning a competitive interest rate and retaining the peace of mind that comes with short-term liquidity. Unfortunately for those investors, short-term liquidity was merely a façade: ARPS actually carried an undisclosed risk of auction failure.<sup>24</sup>

In February 2008, ARPS began to fail,<sup>25</sup> and investors began to worry.<sup>26</sup> The manner in which brokerage firms advertised and marketed the ARPS to potential investors produced an informational disconnect. While brokerage firms led investors to believe that the auctions would guarantee redemption and liquidity at the investor's option, the brokerage firms did not warn of the possibility that the auctions might fail for lack of buyers.<sup>27</sup> Unfortunately, the worst-case

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20. See generally Jenny Anderson et al., *New Trouble in Auction-Rate Securities*, N.Y. TIMES, Feb. 15, 2008, at C6 (providing an overview of auction-rate securities and the liquidity crisis, and reporting on the first auction failures).

21. *Id.*

22. See *id.* ("The banks typically pitch these securities . . . as safe alternatives to cash [when] [t]he bonds are, in fact, long-term securities.").

23. See *id.* ("[T]he banks [held] weekly or monthly auctions to set the interest rates and give holders the option of selling the securities.").

24. *Id.* Auction failure is "when supply exceeds demand—in other words, when there are not enough bids to purchase all the securities offered for sale in the auction." *Auction Rate Securities: What Happens When Auctions Fail*, FINRA.ORG (Nov. 18, 2008), <http://www.finra.org/Investors/ProtectYourself/InvestorAlerts/Bonds/P038207>.

25. See *id.* Thomas James, chairman and chief executive of Raymond James Financial Inc., issued an apology to his ARPS clients in a letter filed with the Securities and Exchange Commission in January 2009. He wrote that the ARPS freeze of 2008 was the first time in nearly two decades that auctions failed significantly. Margie Manning, *Tom James Apologizes for Auction Rate Security Purchases*, TAMPA BAY BUS. J., Jan. 5, 2009, available at 2009 WLNR 208450.

26. See Daisy Maxey, *Discount Sales Can Be a Boon for Investors; Amid Auction-Rate Woes, Holders of Some Shares Find Themselves Stuck*, WALL ST. J., Feb. 20, 2008, at C13.

27. See Page Perry LLC, *Citi Settles \$72 Million Lawsuit Involving Auction Rate Securities*, INVESTMENT FRAUD LAWYER BLOG (Jan. 18, 2010), <http://www.investmentfraudlawyer>

scenario became reality: the buyer's market vanished, auctions failed, and ARPS investors were left with illiquid pieces of paper.<sup>28</sup> As a result, the ARPS freeze may have frozen up to \$330 billion in assets.<sup>29</sup>

Shortly after that debacle, investors demanded that banks and brokerage firms redeem the investors' ARPS based on the liquidity representations that the individual brokers made to investors.<sup>30</sup> The firms told some ARPS investors that they should have read the fine print in their fund prospectuses—which some never received—rather than rely upon individual broker representations.<sup>31</sup> Understandably, investors were furious.<sup>32</sup> What they had believed to be liquid securities turned out to be frozen assets with no ascertainable maturity date—the ARPS could take years to redeem. Perhaps the most ominous quality of those ARPS was that there was no guarantee that they could *ever* be redeemed.<sup>33</sup>

The 2008 ARPS freeze presents a clear example of when consumers might elect to pursue claims against businesses for violations of Business & Professions Code sections 17200–17500. A cursory review of the facts suggests a fraudulent prong claim, a deceptive advertising claim, and possibly an unfair business practice claim as well. And while investors affected by the ARPS freeze were sophisticated and consulted lawyers to bring individual lawsuits, unfortunately this type of deceptive marketing of securities probably would not meet California's current commonality requirements for class certification in a UCL representative action. The California Supreme Court has declined to certify UCL classes where individual

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blog.com/2010/01/citi\_settles\_72\_million\_lawsuit.html#more ("Auction rate securities were once routinely marketed as safe, cash equivalents that were highly liquid, but the broker-dealers who sold them failed to disclose that liquidity was entirely dependent upon the success of the auction process.").

28. *Id.*

29. Associated Press, *Citigroup and UBS Agree to Buy Back Risky Securities*, N.Y. TIMES, Dec. 12, 2008, at B8; see Jenny Anderson et al., *supra* note 20, at C6.

30. See Robert, Comment to *When the Collapsed Auction Rate Securities (ARS) Market Gets Personal*, BLOGGINGSTOCKS (Feb. 28 2008, 10:39 AM), <http://www.bloggingstocks.com/2008/02/27/when-the-collapsed-auction-rate-securities-ars-market-gets-per/>.

31. See Lisa Swanson, Comment to *When the Collapsed Auction Rate Securities (ARS) Market gets Personal*, BLOGGINGSTOCKS (Feb. 28, 2008, 4:48 PM), <http://www.bloggingstocks.com/2008/02/27/when-the-collapsed-auction-rate-securities-ars-market-gets-per/>.

32. *See id.*

33. *See* Page Perry LLC, *supra* note 27.



brokers or subcontractors were responsible for the alleged wrongful conduct.<sup>34</sup> The court denied certification for lack of commonality because it could not conclude that each broker described the ARPS to potential investors in exactly or substantially the same way.

This Note challenges the current commonality barrier, which would probably block cases arising from events like the 2008 ARPS freeze from achieving class certification, and recommends that courts scrutinize the common issues of law that underlie the instances of fraudulent marketing. In the ARPS freeze, the securities operated in exactly the same way: regardless of the wording, all investors were promised that their investments would be liquid, and all investors suffered the same type of harm—the freezing of their assets.<sup>35</sup> If courts choose to look for them, the requirements of commonality will be met. A less restrictive definition of commonality would allow investors affected by the ARPS freeze to bring a UCL class action against the brokerage firms that sold the ARPS with the promise of liquidity. Certifying the class would not guarantee recovery, but it would allow class members to more easily get their day in court.

### III. EXAMINING CALIFORNIA'S UNFAIR COMPETITION LAW

After the enactment of California's Unfair Competition Law in 1933,<sup>36</sup> California became one of the most consumer-friendly states in actions alleging fraudulent and unfair business practices.<sup>37</sup>

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34. See *Kaldenbach v. Mut. of Omaha Life Ins. Co.*, 100 Cal. Rptr. 3d 637 (Ct. App. 2009) (affirming class certification on the grounds that individual issues predominated where independent contractor agents sold the allegedly deceptive and fraudulent products).

35. Consider an investor with \$400,000 in liquid assets who purchases \$200,000 worth of ARPS with the intention of redeeming his securities within two weeks to purchase property. Suppose further that this investor has already agreed to purchase the property and must make payment shortly after the upcoming maturity date for his short-term "liquid" ARPS investments. The ARPS freeze would prevent this investor from making his contemplated property investment. Further, because of his lost business opportunity, his damages would likely be much greater than those of another investor with no immediate need to redeem her ARPS funds. Additionally, this hypothetical investor has half of his liquid assets frozen in ARPS, forcing him to use the entire remainder of his liquid assets to complete the deal or else breach the purchase agreement and suffer further damages on account of the contractual breach. In short, the ARPS had no "redeeming qualities," in either meaning of the term.

36. See Arkin, *supra* note 1, at 156 (discussing the enactment of California Civil Code section 3389 in 1933 and its subsequent reclassification in the Business and Professions Code).

37. See Brian Wolfman, *Dear California Supreme Court: Did Prop 64 Impose a Reliance Requirement?*, CONSUMER L. & POL'Y BLOG (Sept. 15, 2006), [http://pubcit.typepad.com/clpblog/2006/09/dear\\_california.html](http://pubcit.typepad.com/clpblog/2006/09/dear_california.html) (recognizing that prior to Proposition 64, California's UCL was regarded as "one of the nation's most plaintiff-favorable, consumer-friendly consumer protection statutes").

Originally, California's UCL allowed for injunctive relief and provided broad, sweeping protections against false advertising and unfair business practices. The UCL was so far reaching in part because it authorized actions brought by both public prosecutors and private attorneys general,<sup>38</sup> seeking relief on behalf of themselves or third parties.<sup>39</sup> Those private attorney general actions effectively provided vehicles for policing unlawful business practices without prior showings that plaintiffs had been injured by those practices.<sup>40</sup>

In 1963, the Legislature expanded the UCL's scope even further. Because the goal of the UCL is "to address the general societal harm that results when business enterprises act illegally or unethically,"<sup>41</sup> the focus of unfair business practice litigation shifted away from the harm that one business caused another<sup>42</sup> and instead shifted toward the harm that one business caused the entire consuming public.<sup>43</sup> Therefore, the legislature amended the UCL to protect against "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."<sup>44</sup>

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38. Press Release, Pillsbury Winthrop LLP, California Voters Limit Private Enforcement of Unfair Competition Law (Nov. 4, 2004) (on file with author) (describing California's UCL as "truly unusual and abuse prone" because it allowed any person to sue as a "private attorney general").

39. See *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 667 (Cal. 1983).

40. See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1095 (Cal. 1998) (acknowledging that since the inception of California's UCL, unfair competition actions have been able to be prosecuted "by 'any person'").

41. Arkin, *supra* note 1, at 157.

42. The California Supreme Court has recognized that although the tort of unfair business competition historically required a *competitive* injury among business entities, "the language of section 17200 . . . 'demonstrates a clear design to protect consumers as well as competitors by its final clause, permitting *inter alia*, any member of the public to sue on his own behalf or on behalf of the public generally.'" *Comm. on Children's Television, Inc.*, 673 P.2d at 667 (emphasis added) (quoting *Barquis v. Merchs. Collection Ass'n. of Oakland, Inc.*, 496 P.2d 817, 828 (Cal. 1972)); Arkin, *supra* note 1, at 157 (discussing the appreciably broadened and changing legal concept of unfair competition); see also *Barquis*, 496 P.2d at 829 ("[C]onsumers, rather than competitors, need the greatest protection from sharp business practices."); Arkin, *supra* note 1, at 157 (quoting *People ex. rel. Mosk v. Nat'l Research Co. of Cal.*, 201 Cal. App. 2d 765, 770 (1962), and discussing how "the legal concept of unfair competition broadened appreciably" and changed)).

43. *Bank of the W. v. Superior Ct.*, 833 P.2d 545, 551 (Cal. 1992) (quoting *Barquis*, 496 P.2d at 828).

44. CAL. BUS. & PROF. CODE § 17200 (West 2008).

*A. Stating a Cause of Action Under Section 17200*

On a superficial level, section 17200—the heart of the UCL—appears simple. The defining section is one sentence long and does not make sesquipedalian references. Section 17200 simply reads, “[a]s used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.”<sup>45</sup> However, despite the brevity of section 17200, courts have struggled to pinpoint the bounds of the UCL. Over the course of years, California courts have developed bodies of case law defining the three dominant prongs of the UCL. These three prongs—unlawful, unfair, and fraudulent—provide three broad umbrellas for a plaintiff’s action under the UCL. Additionally, since section 17200 “is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent.”<sup>46</sup> In other words, “a practice is prohibited as ‘unfair’ or ‘deceptive’ even if not ‘unlawful’ and vice versa.”<sup>47</sup>

*1. Unlawful*

Before considering the current commonality standard for class certification of UCL actions, it is critical to understand the requirements of the underlying UCL cause of action, beginning with the unlawful prong. California courts have recognized that the UCL’s unlawful prong allows for actions based on *any* unlawful act.<sup>48</sup> Essentially, the California Supreme Court found that the UCL “‘borrows’ violations of other laws and treats these violations, when committed pursuant to business activities, as unlawful practices independently actionable under [the UCL].”<sup>49</sup> Such UCL claims include actions predicated on laws at virtually every level of government.<sup>50</sup> State statutes,<sup>51</sup> state regulations,<sup>52</sup> federal statutes,<sup>53</sup>

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45. *Id.*

46. *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 540 (Cal. 1999) (quoting *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 98 (Ct. App. 1996)).

47. *Id.*

48. *State Farm Fire & Cas. Co. v. Superior Ct.*, 53 Cal. Rptr. 2d 229, 234 (Ct. App. 1996).

49. *Farmers Ins. Exch. v. Superior Ct.*, 826 P.2d 730, 734 (Cal. 1992).

50. See STRICKLAND & SIMONETTI, *supra* note 6, at 10.

federal regulations,<sup>54</sup> local ordinances,<sup>55</sup> and standards of professional conduct<sup>56</sup> have all provided bases for UCL unlawful-prong litigation.<sup>57</sup>

Based on this interpretation, the unlawful prong of the UCL makes it possible to enforce the provisions of any law regardless of whether the underlying law itself includes an enforcement mechanism.<sup>58</sup> This is because the plaintiff's underlying claim is a UCL claim alleging violations of section 17200 rather than a claim based on the predicate law.<sup>59</sup> In the past, UCL defendants tried to avoid liability by asserting that because the predicate law does not have an enforcement mechanism, it therefore cannot form the basis for a UCL claim.<sup>60</sup> The California Supreme Court rejected this defense and resoundingly cemented section 17200 as an independently available remedy against unlawful-prong actions.<sup>61</sup>

*a. Federal preemption of state law in UCL unlawful-prong actions*

Considering the defenses available to UCL defendants is important to the class certification inquiry because a successful

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51. See, e.g., *Powers v. Pottery Barn, Inc.*, 99 Cal. Rptr. 3d 693, 694–95 (Ct. App. 2009) (allowing a UCL unlawful-prong action where plaintiff alleged that Pottery Barn's collection of customer e-mail addresses in conjunction with credit card purchases violated the Song-Beverly Credit Card Act of 1971, a California state statute, and also gave rise to a UCL claim).

52. See *People v. Casa Blanca Convalescent Homes, Inc.*, 206 Cal. Rptr. 164, 174–75 (Ct. App. 1984) (allowing a UCL unlawful prong action predicated on nursing-home regulations).

53. See *Roskind v. Morgan Stanley Dean Witter & Co.*, 95 Cal. Rptr. 2d 258, 262 (Ct. App. 2000) (“[C]ase authority clearly provides that violation of a federal law may serve as a predicate for a section 17200 action.”).

54. See *Sw. Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805, 808 (N.D. Cal. 1989) (allowing a Navy regulation to serve as a predicate for a UCL unlawful-prong action).

55. *Saunders v. Superior Ct.*, 33 Cal. Rptr. 2d 438, 441 (Ct. App. 1994) (citing *People v. McKale*, 602 P.2d 731, 733–34 (Cal. 1979)) (“The ‘unlawful’ practices forbidden by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory or court-made.”).

56. See *id.* at 441 (observing that a UCL unlawful-prong action may borrow from any law, be it civil or criminal, regardless of whether the law includes a private right of action, including a state-licensing statute governing certified shorthand reporters).

57. STRICKLAND & SIMONETTI, *supra* note 6, at 10.

58. See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1099 (Cal. 1998) (rejecting defendant's argument that plaintiff's UCL claim should fail because the predicate law lacks an enforcement mechanism and finding instead that the legislature's clear intent was that remedies and penalties under the UCL should be cumulative to other remedies and penalties).

59. *Arkin*, *supra* note 1, at 158.

60. See, e.g., *Stop Youth Addiction, Inc.*, 950 P.2d at 1096.

61. *Id.* at 1099.

defense will preclude a court from ever reaching the commonality issue.<sup>62</sup> Therefore, an important part of UCL litigation for plaintiffs consists of understanding and successfully attacking available UCL defenses.

Defendants in UCL actions have several defenses at their disposal.<sup>63</sup> For unlawful-prong claims in particular, one such defense is the federal-preemption defense.<sup>64</sup> The idea of federal preemption stems from the Supremacy Clause of the U.S. Constitution.<sup>65</sup> To establish this defense, a defendant must successfully argue that federal law either expressly or impliedly preempts the state law or

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62. If a UCL defendant can show that the alleged unlawful conduct is protected, then the court may grant a motion to dismiss and will no longer consider certifying the class. *See* FED. R. CIV. P. 12(b)(6).

63. *See generally* STRICKLAND & SIMONETTI, *supra* note 6, at 11–12 (outlining defenses specific to unlawful-prong claims and noting that “[a]n affirmative defense to a violation of the underlying law also is a defense to the attendant unlawful claim”).

64. *See, e.g., In re Tobacco II Cases*, 163 P.3d 106 (Cal. 2007) (holding that the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, preempts any state-law cause of action that seeks to regulate cigarette advertising on the ground that it targets minors and encourages them to begin smoking). The federal-preemption defense may take several different forms. *See generally* Crystal Yagoobian, *Anticipating Defenses to UCL Claims*, CONSUMER ADVOC. LEGAL UPDATE, (Jan. 8, 2010, 8:03 AM), <http://consumeradvocatelegalupdate.com/2010/01/articles/class-actions/anticipating-defenses-to-ucl-claims> (describing different forms of the federal-preemption defense). One type of federal-preemption defense is where federal law specifically bars the claim brought under a predicate state law. *E.g., Safeco Ins. Co. of Am. v. Superior Ct.*, 265 Cal. Rptr. 585, 587 (Ct. App. 1990). A second type of federal-preemption defense is a showing that the alleged unlawful conduct is specifically permitted by federal law despite a state law that makes the alleged misconduct unlawful. *E.g., Shvarts v. Budget Grp., Inc.*, 97 Cal. Rptr. 2d 722, 727 (Ct. App. 2000). A third type of federal-preemption defense is where the predicate state law addresses areas so densely occupied by federal law that courts decline to allow a state law to form a UCL predicate. *E.g., Cong. of Cal. Seniors v. Catholic Healthcare W.*, 104 Cal. Rptr. 2d 655, 668 (Ct. App. 2001). One recent development in the area of federal preemption is the landmark case of *Wyeth v. Levine*, 555 U.S. 1 (2009), in which the U.S. Supreme Court rejected an implied federal-conflict-preemption defense that argued that a stricter state drug-labeling law would obstruct the purposes and objectives of federal drug-labeling regulations prescribed by the Food and Drug Administration (FDA). *Id.* at 25. The Court held that the FDA’s approval of an informational drug label does not preempt a claim brought under stricter state laws requiring a more detailed drug label. *Id.* In *Wyeth*, the plaintiff brought a product-liability claim against a drug manufacturer for failure to warn of the dangers inherent in the intravenous administration of their anti-nausea drug through the “IV push” method rather than the “IV drip” method. *Id.* at 2–3. Since the FDA had already approved this particular label, the defendants argued that they could not modify the labels to comply with Vermont’s stricter state laws, which required a more detailed warning label. *Id.* at 12. The Court ultimately rejected this argument, applying the presumption that the historic police powers of the states may not be superseded by federal acts and acknowledging that this principle also applies to claims of implied conflict preemption. *Id.* at 25. *Wyeth* stands for the principle that the issue of federal preemption is, at its very core, an issue of congressional intent. *Id.* at 17–19.

65. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.”).

regulation upon which the plaintiff bases the UCL unlawful-prong claim.<sup>66</sup> The issue of federal preemption is primarily an examination of congressional intent to preempt state laws or to allow states to occupy particular fields of regulation.<sup>67</sup>

*b. The significance of In re Farm Raised Salmon Cases and the future of implied federal preemption*

Under the current Business and Professions Code sections 17200–17500, the federal preemption defense is an important concern for UCL plaintiffs because a successful showing can bar an entire UCL claim, effectively killing litigation at the pleading stage and before the court even considers issues of class certification.<sup>68</sup> Since the focus of this Note is to address the narrowing applications of commonality to UCL-class-certification decisions, it is important to first consider obstacles to reaching the class certification stage and to then understand how UCL plaintiffs may overcome them. A proper understanding of the federal-preemption defense will aid in plaintiffs successfully reaching the class-certification stage and in addressing the problems of UCL representative action commonality that this Note raises.

In *In re Farm Raised Salmon Cases*, the California Supreme Court decided whether federal preemption constitutes a total bar to a UCL unlawful-prong claim predicated on the violation of a state law.<sup>69</sup> In that case, plaintiffs brought a class-action lawsuit against various grocery store owners for failing to disclose that they sold artificially colored salmon.<sup>70</sup> The artificial-coloring distinction was important because wild salmon have a fleshy, pink color while

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66. See generally AM. JUR. 2D *Constitutional Law* § 53 (2009) (providing an overview of constitutional law relating to federal preemption and discussing express, implied, and conflict preemption as functions of congressional intent).

67. See *Wyeth*, 555 U.S. at 17–19; *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga*, 96 Cal. Rptr. 3d 813, 835 (Ct. App. 2009) (“The intent of Congress is paramount in determining whether preemption applies.”); see also *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (discussing express and implied federal preemption of state laws and finding that “[i]n the absence of express pre-emptive language, Congress’ intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation”).

68. See FED. R. CIV. P. 12(b)(6).

69. 175 P.3d 1170, 1184 (Cal. 2008), *cert. denied*, 129 S. Ct. 896 (2009).

70. *Id.* at 1173.

farmed salmon have a grayish color.<sup>71</sup> Additionally, some research suggests that artificial coloring and food additives pose health risks.<sup>72</sup> Believing that consumers used the color of salmon to infer origin, quality, freshness, and flavor, plaintiffs asserted claims of false advertising, negligent misrepresentation, and unfair and deceptive trade practices under the Consumers Legal Remedies Act<sup>73</sup> (CLRA), in addition to asserting a UCL unlawful-prong claim premised on California's Sherman Food, Drug, and Cosmetic Law<sup>74</sup> ("Sherman Law").<sup>75</sup>

The Sherman Law prohibits the artificial coloring of food without first disclosing the additives on a food label.<sup>76</sup> The issue in *In re Farm Raised Salmon Cases* was whether section 337(a) of the Federal Food, Drug, and Cosmetic Act<sup>77</sup> (FDCA) preempted plaintiffs' UCL claim because the plaintiffs based the claim on the violation of a state law where there was an applicable federal law.<sup>78</sup> Defendants argued that the FDCA regulated exactly the type of nondisclosure of food additives that plaintiffs complained of.<sup>79</sup>

The trial court held, and the appellate court affirmed, that the FDCA preempted the plaintiffs' UCL claim.<sup>80</sup> On appeal, the California Supreme Court reversed, noting that federal preemption is a question of congressional intent.<sup>81</sup> Based on its analysis of FDCA sections 337(a) and 343(k), the California Supreme Court held that the identical requirements of the Sherman Law and the FDCA necessarily meant that Congress did not intend for the FDCA to preempt state law.<sup>82</sup>

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71. *Id.*

72. See, e.g., David W. Schab & Nhi-ha T. Trinh, *Do Artificial Food Colors Promote Hyperactivity in Children with Hyperactive Syndromes? A Meta-Analysis of Double-Blind Placebo-Controlled Trials*, 25 J. DEV. & BEHAV. PEDIATRICS 423, 428 (2004).

73. CAL. CIV. CODE §§ 1750–1785 (West 2009).

74. CAL. HEALTH & SAFETY CODE §§ 109875–111915 (West 2006).

75. *In re Farm Raised Salmon Cases*, 175 P.3d at 1172–74.

76. CAL. HEALTH & SAFETY CODE §§ 109895, 110370, 110470 (West 2006).

77. 21 U.S.C. §§ 301–399(a) (2006).

78. *In re Farm Raised Salmon Cases*, 175 P.3d at 1173.

79. *Id.* at 1174.

80. *Id.*

81. *Id.* at 1176.

82. *Id.* at 1175–77, 1184; see Rebecca Tushnet, *Preemption Argument Swims Upstream to Die*, REBECCA TUSHNET'S 43(B)LOG, (Feb. 17, 2008, 10:56 PM), <http://tushnet.blogspot.com/2008/02/preemption-argument-swims-upstream-to.html>.

With respect to the defendants' preemption argument, the California Supreme Court also distinguished between express preemption and implied preemption.<sup>83</sup> The court found that Congress has the express authority to preempt state law where two conditions are satisfied: (1) the state law at issue concerns matters that lie within the authority of Congress; and (2) Congress expressly states that it *intends* for federal regulations to preempt state law.<sup>84</sup>

Despite this discussion of Congress's powers to preempt state laws, the California Supreme Court in *In re Farm Raised Salmon Cases* focused on the states' police powers and concluded that there is a strong presumption against preemption of state-law causes of action.<sup>85</sup> Because the UCL is a cause of action arising under California state law and the Sherman Law is also a California state law, the Court favored a presumption against preemption.<sup>86</sup> The difficulty in rejecting the defendants' preemption argument derived from the fact that California's Sherman Law was entirely derived from the federal FDCA<sup>87</sup>—in fact, the statutory language was identical.<sup>88</sup> But because California's Sherman Law was identical in scope to the FDCA, the court concluded that the plaintiffs' UCL claims could go forward.<sup>89</sup>

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83. *In re Farm Raised Salmon Cases*, 175 P.3d at 1176.

84. *Id.*

85. *Id.* (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); *Bronco Wine Co. v. Jolly*, 95 P.3d 422, 428 (Cal. 2004); see *Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 162 P.3d 569, 572 (Cal. 2007).

86. *In re Farm Raised Salmon Cases*, 175 P.3d at 1176.

87. See *id.* at 1175.

88. Compare CAL. HEALTH & SAFETY CODE § 110740 (West 2006) ("Any food is misbranded if it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless its labeling states that fact. Exemptions may be established by the department.") with 21 U.S.C. § 343(k) (2006) ("A food shall be deemed to be misbranded . . . (k) If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact, except that to the extent that compliance with the requirements of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the Secretary.").

89. See *In re Farm Raised Salmon Cases*, 175 P.3d at 1178–81 (considering the significance of the identical statutory language of California's Sherman Law and the FDCA and concluding that a mere showing of identical statutory language does not per se preempt the enforcement of a state regulation through private right of action).



*c. Federal preemption: State and federal regulations with identical statutory language*

The FDCA prohibits misbranding of any food.<sup>90</sup> Section 343(k) of the FDCA deems a food misbranded if “it bears or contains any . . . artificial coloring . . . unless it bears labeling stating that fact.”<sup>91</sup> After it adopted the FDCA, Congress passed the Nutrition Labeling and Education Act of 1990<sup>92</sup> (NLEA). This act amended the FDCA because Congress wanted to create a uniform national standard and was concerned that states might adopt inconsistent food labeling requirements.<sup>93</sup> The NLEA added an explicit preemption provision to FDCA section 343-1(a):

“[N]o State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce . . . any requirement for the labeling of food of the type required by section . . . [343(k)] of this title *that is not identical to the requirement* of such section . . . .”<sup>94</sup>

Thus, in *In re Farm Raised Salmon Cases*, the defendants argued that the plaintiffs’ claims are impliedly preempted because plaintiffs’ Sherman Law and UCL claims obstructed the objectives and purposes of Congress.<sup>95</sup> However, the California Supreme Court relied on section 343-1(a) in reasoning that federal law only preempts state law causes of action that are not identical to federal standards—it does nothing to interfere with identical state laws.<sup>96</sup> Consequently, the California Supreme Court reversed the appellate

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90. 21 U.S.C. § 331(b) (2006).

91. *Id.* § 343(k).

92. Pub. L. No. 101-535, 104 Stat. 2353 (1990).

93. 136 CONG. REC. 20414, 20418 (1990) (remarks of Rep. Waxman during a debate on H.R. 3562, 101st Cong. (2d sess. 1990)).

94. Pub. L. No. 101-535, 104 Stat. 2362–2363 (1990) (emphasis added).

95. *In re Farm Raised Salmon Cases*, 175 P.3d 1170, 1177 (Cal. 2008).

96. *Id.* at 1178 (“The words of section 343-1 clearly and unmistakably evince Congress’s intent to authorize states to establish laws that are ‘identical to’ federal law.”) *see* Consumer Justice Ctr. v. Olympian Labs, Inc., 121 Cal. Rptr. 2d 749, 756–57 (Ct. App. 2002) (discussing 21 U.S.C. § 343-1(a) in the context of federal preemption of state claims and taking explicit notice of the provision allowing states to adopt food-labeling requirements that are *identical* to the federal requirements imposed by § 343(r) without subjecting the states’ identical regulations to federal preemption).

court and allowed the UCL unlawful claim based on the alleged violation of the Sherman Law to proceed.<sup>97</sup>

*d. The utility of In re Farm Raised Salmon Cases for UCL plaintiffs*

The decision in *In re Farm Raised Salmon Cases* remains an important tool for plaintiffs in UCL unlawful-prong claims where defendants have raised the issue of federal preemption.<sup>98</sup> Although it is particularly relevant for its interpretation of FDCA section 343-1(a), the court's holding is also highly relevant to future cases in which the predicate state law has identical statutory language to that of a federal law or regulation.<sup>99</sup>

## 2. Unfair

UCL plaintiffs who allege an unfair business practice must meet the standard for unfair conduct as defined by the court.<sup>100</sup> For this reason, it is important to examine the development of courts' understanding of UCL unfair conduct.

The term "unfair" is not precisely defined by the UCL statute, and courts have struggled to provide a bright-line rule.<sup>101</sup> California courts have put forth several different tests for determining what constitutes unfair conduct that rises to a level actionable under the UCL.<sup>102</sup> The existence of multiple tests has further complicated the

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97. *In re Farm Raised Salmon Cases*, 175 P.3d at 1174 n.5 (citing *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 667-69 (Cal. 1983)).

98. *Id.* at 1184.

99. *Id.* at 1178-81.

100. *See Gregory v. Albertson's, Inc.*, 128 Cal. Rptr. 2d 389, 393-94 (Ct. App. 2002).

101. *Id.* at 393-95 (discussing the lack of a workable definition for the UCL's unfair prong). *But see Buller v. Sutter Health*, 74 Cal. Rptr. 3d 47, 55 (Ct. App. 2008) (rejecting the appellant's position that the test for UCL unfairness involved balancing the utility of the defendant's conduct against the gravity of the harm to the alleged victim and instead finding that the test for UCL unfairness "requires [an] allegedly unfair business practice [to] be 'tethered' to a legislatively declared policy or [have] some actual or threatened impact on competition" (internal quotation marks omitted)).

102. Two of the most common tests formerly employed by California courts were a balancing test and a tailored test borrowed from Federal Trade Commission (FTC) guidelines. The first test required courts to balance the challenged practice's impact on the alleged victim against the conduct's utility. *See State Farm Fire & Cas. Co. v. Superior Ct.*, 53 Cal. Rptr. 2d 229, 234 (Ct. App. 1996) (describing the standard as "intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud"). The second test adopted a definition of unfair from FTC guidelines, labeling a business act or practice as unfair where it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Cnty. Assisting Recover, Inc. v. Aegis Sec. Ins. Co.*, 112 Cal. Rptr. 2d 304, 310 (Ct. App. 2001) (quoting *People v. Casa Blanca Convalescent Homes*,

unfairness inquiry, and courts have adopted tests for unfairness that are reserved exclusively for competitor-competitor UCL actions but that do not apply to consumer claims.<sup>103</sup>

Prior to the California Supreme Court's decision in *Cel-Tech Communications v. Los Angeles Cellular Telephone*,<sup>104</sup> courts generally applied the balancing test from *South Bay Chevrolet v. General Motors Acceptance Corp.*<sup>105</sup> to determine whether a business act or practice was unfair under the UCL.<sup>106</sup> The California Supreme Court had not yet distinguished different tests for different types of unfair-prong actions—namely, the consumer-business context and the competitor-competitor context.<sup>107</sup> The California Supreme Court squarely addressed this issue in *Cel-Tech*, where it had to decide which test for unfairness to apply to a competitor-competitor UCL action in which the plaintiff, a cellular telephone seller, alleged that the defendant, a competitor, was intentionally selling its product below cost in order to push the plaintiff out of the market.<sup>108</sup>

Because the traditional *South Bay* balancing test was a less-than-ideal fit for this scenario, the *Cel-Tech* court propounded a new test for UCL unfair conduct after it expressed dissatisfaction with the previously amorphous state of the law.<sup>109</sup> Recognizing that a more precise test was necessary to ensure reasonable certainty of expectations for both businesses and consumers, the *Cel-Tech* court defined unfair business acts or practices as “conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the

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Inc., 206 Cal. Rptr. 164, 177 (Ct. App. 1984)); see *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 85 Cal. Rptr. 2d 301, 316 (Ct. App. 1999); see also STRICKLAND & SIMONETTI, *supra* note 6, at 12 (discussing courts' two tests for defining unfairness).

103. See *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 543–44 (Cal. 1999).

104. *Id.* at 527.

105. 85 Cal. Rptr. 2d 301 (Ct. App. 1999).

106. See Andrew H. Struve & Eugene Hahm, *Appellate Court Urges Clarification of UCL's Definition of "Unfair" in Consumer Cases*, 17200LAW@MANATT, (Manatt, Phelps & Phillips, L.A., Cal., Mar. 24, 2006, available at <http://www.manatt.com/news.aspx?id=3770>).

107. See *Cel-Tech*, 973 P.2d at 544 n.11.

108. *Id.* at 532.

109. *Id.* at 543 (noting that the *South Bay* test's “[v]ague references to ‘public policy,’ for example, provide little real guidance”).

same as a violation of the law, or otherwise significantly threatens or harms competition.”<sup>110</sup>

The court expressly limited its decision to actions by competitors alleging anticompetitive practices by disclaiming any application of its new rule to other contexts in footnote 12.<sup>111</sup> As courts interpreted and applied *Cel-Tech* in later cases, however, the disclaimer in footnote 12 proved to be less enlightening than the court had perhaps intended. For example, some courts read *Cel-Tech* literally: finding that the disclaimer was expressed in disjunctive language,<sup>112</sup> they concluded that the earlier *South Bay* balancing test for unfairness was still in full force within the context of consumer actions, despite *Cel-Tech*’s new definition of “unfair.”<sup>113</sup>

The *Cel-Tech* decision put in flux the rule for unfairness as it applied to consumer suits.<sup>114</sup> The appellate districts split.<sup>115</sup> In *Gregory v. Albertson’s, Inc.*,<sup>116</sup> the First District Court of Appeal returned to the older test for unfairness, which required that the conduct “offend[] an established public policy or . . . [be] immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.”<sup>117</sup> The *Gregory* court imposed an additional requirement: the “allegedly unfair business practice [had to] be ‘tethered’ to a legislatively declared policy or [have] some actual or

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110. *Id.* at 544.

111. *Id.* at 544 n.12 (“This case involves an action by a competitor alleging anticompetitive practices. Our discussion and this test are limited to that context. Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as ‘fraudulent’ or ‘unlawful’ business practices or ‘unfair, deceptive, untrue or misleading advertising.’”).

112. The disjunctive language in footnote 12 was the court’s statement that “[n]othing we say relates to actions by consumers or by competitors.” *Id.* at 544.

113. See *McKell v. Wash. Mut., Inc.*, 49 Cal. Rptr. 3d 227, 240 (Ct. App. 2006) (describing the test for unfairness as a balancing test that must “weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim” (quoting *Wilner v. Sunset Life Ins. Co.*, 93 Cal. Rptr. 2d 413, 422 (Ct. App. 2000))).

114. See *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 735 (9th Cir. 2007); see also *Bardin v. DaimlerChrysler Corp.*, 39 Cal. Rptr. 3d 634, 641 (Ct. App. 2006) (“[A]ppellate court opinions have been divided over whether the definition of ‘unfair’ under the UCL as stated in *Cel-Tech* should apply to UCL actions brought by consumers.”).

115. See *Lozano*, 504 F.3d at 736.

116. 128 Cal. Rptr. 2d 389 (Ct. App. 2002).

117. *Id.* at 394 (citing *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 98 (Ct. App. 1996)).

threatened impact on competition.”<sup>118</sup> Later, the Second District Court of Appeal formulated a more precise test for unfairness in *Camacho v. Automobile Club of Southern California*.<sup>119</sup> The *Camacho* court relied on the language and policy considerations underlying section 5 of the FTCA in concluding that unfair conduct must have three elements: “(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.”<sup>120</sup>

The split among California appellate courts became so disruptive that the Fourth District Court of Appeal posed directed questions to the California Supreme Court or the legislature to resolve.<sup>121</sup>

### 3. Fraudulent

In *State Farm Fire & Casualty Co. v. Superior Court*,<sup>122</sup> the court discussed the test for claims brought under the third prong of the UCL. The court observed that “‘fraud’ contemplated by section 17200’s third prong bears little resemblance to common law fraud or deception.”<sup>123</sup> The test for fraud under the UCL “is whether

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118. *Buller v. Sutter Health*, 74 Cal. Rptr. 3d 47, 55 (Ct. App. 2008) (quoting *Belton v. Comcast Cable Holdings, LLC*, 60 Cal. Rptr. 3d 631, 645 (Ct. App. 2007) (citing *Gregory*, 128 Cal. Rptr. 2d at 393–95)).

119. 48 Cal. Rptr. 3d 770 (Ct. App. 2006).

120. *Id.* at 776–77 (citing *Orkin Exterminating Co. v. Fed. Trade Comm’n*, 849 F.2d 1354, 1364 (11th Cir. 1988)).

121. *Bardin v. DaimlerChrysler Corp.*, 39 Cal. Rptr. 3d 634, 646–47 (Ct. App. 2006) (posing the following questions: “[1] Did the Supreme Court limit its holding in *Cel-Tech* to UCL actions brought by competitors simply because the circumstance of a consumer UCL action was not before it, or because the definition of ‘unfair’ should be different depending on whether the action is brought by a consumer or a competitor? [2] Was the Supreme Court expressing the view that regulation of competitive conduct is contained in existing legislation, but there is no analogous law pertaining to consumers? [3] Should a broader definition of ‘unfair’ apply in consumer actions because consumers require more protection than competitors even though such a distinction between consumers and competitors is not reflected in the language of the statute? [4] Is the *Cel-Tech* definition of ‘unfair’ too narrow to sufficiently protect consumers? [5] Is the definition of ‘unfair’ applied in *Smith v. State Farm Mut. Auto. Ins. Co.*, 113 Cal. Rptr. 2d 399 (Ct. App. 2001), . . . too amorphous in the consumer context, and does it provide ‘too little guidance to courts and business?’”).

122. 53 Cal. Rptr. 2d 229 (Ct. App. 1996).

123. *Id.* at 235.

the public is likely to be deceived.”<sup>124</sup> The standard is based on the expectations of a reasonable consumer.<sup>125</sup> Consequently, UCL fraud violations, unlike common-law fraud, “can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage.”<sup>126</sup>

Recently, the Second District Court of Appeal upheld the “likely to deceive” standard of liability for UCL fraudulent-prong actions. In *Morgan*,<sup>127</sup> plaintiffs who bought Sony Ericsson T68i premium cell phones from AT&T brought a UCL action against the telecommunications company, alleging violations of all three prongs of the UCL.<sup>128</sup> The plaintiffs claimed that they bought the T68i from AT&T based on AT&T’s advertisements about the phone’s international capabilities and other advanced technologies.<sup>129</sup> The plaintiffs alleged, however, that at the time of the advertisements AT&T was already planning to degrade its 1900-megahertz wireless network in a way that would not support the T68i, rendering those phones “essentially unstable” because they operated exclusively on the AT&T network.<sup>130</sup> The plaintiffs argued that based on AT&T’s advertisements, the average consumer would believe that AT&T’s network would support the T68i for the lifetime of the phone.<sup>131</sup> AT&T tried to defeat the claim by arguing that its representations were mere “puffery,” or statements of opinion, and that no reasonable consumer would consider them to constitute statements of fact.<sup>132</sup> In discussing the UCL fraud claim, the court reiterated the following established rule:

[A] fraudulent business practice is one that is likely to deceive members of the public. . . . A UCL claim based on the fraudulent prong can be based on representations that deceive because they are untrue, but “also those which may

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124. *Id.* (citing *Comm. on Children’s Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983)).

125. AM. BAR ASS’N SECTION OF LITIG., CONSUMER PROTECTION LAW DEVELOPMENTS 402 (2009).

126. *Id.* (citing *Comm. on Children’s Television, Inc.*, 673 P.2d at 668).

127. 99 Cal. Rptr. 3d 768 (Ct. App. 2009).

128. *Id.* at 779.

129. *See id.* at 775.

130. *Id.*

131. *Id.* at 776.

132. *See id.* at 781.

be accurate on some level, but will nonetheless tend to mislead or deceive . . . .”<sup>133</sup>

Common-law fraud differs from the UCL’s fraudulent-business-practice prong. Common-law fraud requires a statement to be (1) actually false, (2) known to be false by the perpetrator, and (3) reasonably relied upon by someone who incurs damages as a result.<sup>134</sup> In contrast, UCL fraud does not require the statement or representation to be false—it need only be likely to deceive a reasonable consumer. In fact, under the UCL, “[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable . . . .”<sup>135</sup>

In response to common-law or other statutory actions alleging fraud, courts have articulated policy concerns that support a heightened pleading standard.<sup>136</sup> Indeed, the Federal Rules of Civil Procedure require allegations of fraud to be pleaded with specificity.<sup>137</sup> Because the UCL has three separate prongs and one of those prongs involves fraud, it is important to note the potential implications, if any, of a heightened pleading standard for UCL fraudulent-prong actions.

The California Supreme Court addressed the issue of whether a UCL fraud action must meet a heightened pleading standard in *Committee on Children’s Television, Inc. v. General Foods Corp.*<sup>138</sup> There, plaintiffs brought an action for common-law fraud in addition to UCL claims, alleging that the defendants had conducted

133. *Id.* at 785 (citation omitted) (quoting *McKell v. Wash. Mut., Inc.*, 49 Cal. Rptr. 3d 227, 239 (Ct. App. 2006)) (citing *In re Tobacco II Cases*, 207 P.3d 20, 29 (Cal. 2009)).

134. *See* Arkin, *supra* note 1, at 161–62.

135. *Morgan*, 99 Cal. Rptr. 3d at 785 (quoting *McKell*, 49 Cal. Rptr. 3d at 239).

136. *See, e.g.,* *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2nd Cir. 1994); *see also* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548–49 (2007) (extending the heightened pleading standard beyond mere fraud in an antitrust case between competitors where the plaintiff alleged parallel conduct in the complaint by simply asserting that the defendant engaged in a conspiracy in restraint of trade). The court held that in order to survive a motion to dismiss, plaintiffs must allege enough facts in a complaint to make their claim plausible. *Twombly*, 550 U.S. at 570. *Twombly* remains one of the most cited decisions by defendants bringing Federal Rule of Civil Procedure 12(b)(6) motions to dismiss for failure to state a claim. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1295 (2010). To date it has been cited at least 24,000 times. *Id.* at 1296 n.9.

137. FED. R. CIV. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”).

138. 673 P.2d 660, 667 (Cal. 1983).

fraudulent, misleading, and deceptive advertising in marketing sugared breakfast cereals.<sup>139</sup> Plaintiffs further alleged that defendants had engaged in a nationwide, long-term advertising campaign designed to persuade children, by imagery and example, to influence their parents to buy sugared cereals.<sup>140</sup> After a preliminary discussion of whether the standard of “likely to deceive a reasonable consumer” should apply to the cereal companies with regard to the parents who purchased the cereal or to the children who viewed the television commercials, the court concluded that “[t]he requirement that fraud must be pleaded with specificity . . . does not apply to causes of action under the consumer protection statutes.”<sup>141</sup> Therefore, complaints alleging violations of the UCL fraud prong are subject to the ordinary pleading standard—a short and plain statement alleging facts upon which relief can be granted.<sup>142</sup>

#### 4. No Requirement of Scierter

Like the other UCL prongs, the fraud prong has no scierter requirement—that is, the actor need not subjectively know that the statements are fraudulent.<sup>143</sup> As the *State Farm* court proclaimed, “[i]t is not necessary to show that the defendant intended to injure anyone”<sup>144</sup> to state a claim under the UCL. As recently as last year, the California Supreme Court confirmed that section 17200 does not carry any requisite level of intent or scierter.<sup>145</sup>

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139. *Id.* at 663.

140. *Id.* at 676.

141. *Id.* at 669 n.11.

142. *See* FED. R. CIV. P. 8(a)(2).

143. *Munson v. Del Taco, Inc.*, 208 P.3d 623, 632 (Cal. 2009). *But see* CAL. BUS. & PROF. CODE § 17500 (West 2008).

144. *State Farm Fire & Cas. Co. v. Superior Ct.*, 53 Cal. Rptr. 2d 229, 233 (Ct. App. 1996) (citing *People ex rel. Van de Kamp v. Cappuccio, Inc.*, 251 Cal. Rptr. 657, 663–64 (Ct. App. 1988)).

145. *See Munson*, 208 P.3d at 632; *see also* Kimberly A. Kralowec, *Supreme Court Discusses UCL “Unlawful” Prong: Munson v. Del Taco, Inc.*, THE UCL PRAC. (July 23, 2009, 6:00 AM), <http://www.uclpractitioner.com/2009/07/supreme-court-discusses-ucl-unlawful-prong-munson-v-del-taco-inc.html> (discussing an excerpt from the *Munson* decision and concluding that the court’s “language is also useful for its confirmation that the UCL carries no ‘intent’ element (or any other element of scierter)”).



### *B. Broad Language of the UCL*

The three dominant prongs of the UCL have a rich case law history, and the differing interpretations of that case law demonstrate the statute's broad overall scope. Prior to the passage of Proposition 64, when the UCL allowed for representative actions brought by private attorneys general, the law was ostensibly even broader in scope.<sup>146</sup> This was no accident.

The UCL was intentionally written broadly.<sup>147</sup> It "has a broader scope for a reason. '[T]he Legislature . . . intentionally framed [the UCL] in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable "new schemes which the fertility of man's invention would contrive.'"<sup>148</sup>

Although the scope of the statute was intentionally broad to provide maximum protection for consumers and businesses against unfair competition, the framework also allowed for some abuse.<sup>149</sup> As a result of these actual and perceived abuses of the UCL, Californians passed Proposition 64 during the November 2004 elections.<sup>150</sup>

### *C. Proposition 64 and Its Implications on Standing to Bring UCL Actions*

Prior to the passage of Proposition 64, [a]ctions for relief [under the UCL could be] prosecuted . . . by the Attorney General or any other district attorney or by any county counsel . . . [or] by a city prosecutor . . . [or] by a city attorney . . . or upon the complaint of any board, officer, person, corporation or association or by *any person acting for the interests of itself, its members or the general public*.<sup>151</sup>

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146. See *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 540 (Cal. 1999).

147. PERKINS COIE, WHO'S THE FAIREST OF THEM ALL? LITIGATING CLAIMS UNDER CALIFORNIA'S UNFAIR COMPETITION LAW (BUS. & PROF. CODE § 17200 ET SEQ.) 6 (2009) (on file with author).

148. *Cel-Tech*, 973 P.2d at 540 (quoting *Am. Philatelic Soc'y v. Claiborne*, 46 P.2d 135, 140 (Cal. 1935)).

149. See *supra* text accompanying note 10.

150. CAL. SEC'Y OF STATE, *supra* note 12; see CAL. SEC'Y OF STATE, *supra* note 11, at 40.

151. *In re Tobacco II Cases*, 207 P.3d 20, 25 (Cal. 2009).

After California voters approved Proposition 64, section 17204 of the California Business and Professions Code was amended to read that UCL actions may only be brought by a person “who has suffered injury in fact and has lost money or property as a result of such unfair competition.”<sup>152</sup> Further, section 17203 was amended to read as follows: “[a]ny person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of section 17204 and complies with Section 382 of the Code of Civil Procedure.”<sup>153</sup>

#### *D. Requirements for Class Certification*

The Federal Rules of Civil Procedure allow class certification upon a showing of four elements:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.<sup>154</sup>

For simplification purposes, these class certification requirements are referred to as numerosity, commonality, typicality, and adequacy of the class representative, respectively. Additionally, the proposed class must meet one of the requirements set forth in Rule 23(b).<sup>155</sup>

Under California’s class-action statute, section 382 of the California Civil Code of Procedure, one or more plaintiffs may “sue or defend for the benefit of all”<sup>156</sup> “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.”<sup>157</sup>

California’s statute mirrors the federal rules in that it requires both a common nucleus of law or fact and enough parties that joinder is impracticable. Despite the overt similarities between California’s statute and the federal rules, UCL standing requirements following

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152. CAL. BUS. & PROF. CODE § 17203 (West 2008).

153. *Id.* § 17203.

154. FED. R. CIV. P. 23(a).

155. FED. R. CIV. P. 23(b).

156. CAL. CIV. PROC. CODE § 382 (West 2009).

157. *Id.*

the passage of Proposition 64 were not clear until 2009, when the California Supreme Court addressed the issue directly in *In re Tobacco II*.<sup>158</sup>

*E. How In re Tobacco II Cases Changes the Game*

In May 2009, the California Supreme Court decided *In re Tobacco II*, a UCL deceptive-advertising-prong case that presented issues of first impression raised by the post-Proposition 64 standing requirements.<sup>159</sup>

In *In re Tobacco II*, plaintiff-consumers brought a class-action suit against tobacco companies in which the plaintiffs alleged that the companies had violated the UCL by conducting a long campaign of deceptive advertising and making misleading statements about both the addictive nature of nicotine and the relationship between tobacco use and disease.<sup>160</sup> Before the passage of Proposition 64, the trial court had certified the case as a class action.<sup>161</sup> However, after the passage of Proposition 64, the trial court decertified the class after concluding that Proposition 64 required individual standing—that is, proof of an injury in fact—for each class member.<sup>162</sup> In reaching this conclusion, the trial court made the following finding:

[T]he injury in fact that each class member must show for standing purposes in this case would presumably consist of the cost of their cigarette purchases. But significant questions then arise undermining the purported commonality among the class members, such as whether each class member was exposed to Defendants' alleged false statements and whether each member purchased cigarettes 'as a result' of the false statements. Clearly . . . individual issues predominate, making class treatment unmanageable and inefficient.<sup>163</sup>

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158. See *In re Tobacco II Cases*, 207 P.3d 20, 25 (Cal. 2009).

159. *Id.*

160. *Id.*

161. *In re Tobacco II Cases*, No. JCCP 4042, 2004 WL 2445337, at \*2 (Cal. Superior Ct. Aug. 4, 2004) (order granting in part and denying in part defendants' four motions for summary judgment).

162. *In re Tobacco II Cases*, No. JCCP 4042, 2005 WL 579720, at \*6–7 (Cal. Superior Ct. Mar. 7, 2005) (order granting motion for class decertification).

163. *Id.* at \*6.

Following the decertification of the class, plaintiffs appealed. The court of appeal affirmed, approving the trial court's interpretation of Proposition 64's "injury in fact" requirement as applied in this particular class-action setting.<sup>164</sup> Because of the paramount importance of interpreting Proposition 64 uniformly, the California Supreme Court granted certiorari.<sup>165</sup> On review, the court addressed two issues: (1) who must meet the standing requirement in a UCL class action, the representative plaintiff or all class members; and (2) what is required to establish standing under the UCL as amended by Proposition 64.<sup>166</sup>

### 1. Only the Class Representative Must Meet Proposition 64's Standing Requirements

With respect to the first issue, the *In re Tobacco II* court looked to the legislative intent underlying Proposition 64 in order to determine whether the drafters intended to impose standing requirements on absent class members. In doing so, the court found no ambiguities in the statutory authority. The court focused on the statutory language of the amended UCL:

[T]he references in section 17203 to one who wishes to pursue UCL claims on behalf of others are in the singular; that is, the "person" and the "claimant" who pursues such claims must meet the standing requirements of section 17204 and comply with Code of Civil Procedure section 382. The conclusion that must be drawn from these words is that only this individual—the representative plaintiff—is required to meet the standing requirements. Thus, the plain language of the statute lends no support to the trial court's conclusion that all unnamed class members in a UCL class action must demonstrate section 17204 standing.<sup>167</sup>

Additionally, the court considered the Proposition 64 ballot materials and noted that the materials did not reference class actions or give

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164. *In re Tobacco II Cases*, 47 Cal. Rptr. 3d 917, 919 (Ct. App. 2006), *rev'd*, 207 P.3d 20, 26 (Cal. 2009).

165. *In re Tobacco II Cases*, 146 P.3d 1250 (Cal. 2006).

166. *In re Tobacco II Cases*, 207 P.3d 20, 25 (Cal. 2009).

167. *Id.* at 32.

“any indication that Proposition 64 was intended in any way to alter the rules surrounding class certification.”<sup>168</sup>

## 2. Clarifying UCL Standing Requirements After Proposition 64

The *In re Tobacco II* court continued its statutory analysis of the class certification requirements under Proposition 64 by comparing California’s requirements in section 382<sup>169</sup> with federal requirements in Rule 23 of the Federal Rules of Civil Procedure.<sup>170</sup> The court reasoned that because “federal case law is clear that the question of standing in class actions involves the standing of the class representative and not the class members,”<sup>171</sup> the standing requirement under section 382 of the California Code of Civil Procedure should be the same.<sup>172</sup>

After considering legislative intent and engaging in statutory interpretation of section 17204’s standing requirements as amended by Proposition 64, the California Supreme Court ultimately held that the standing requirements in a UCL class action brought in accordance with section 17203 of the California Business and Professions Code and with section 382 are applicable only to the class representatives where class requirements have otherwise been satisfied.<sup>173</sup> This conclusion is the touchstone of the court’s opinion and has formed the basis of much discussion among UCL practitioners.<sup>174</sup>

## IV. THE COMMONALITY PROBLEM IN UCL CLASS CERTIFICATIONS

Under the new statutory scheme and pursuant to the California Supreme Court’s interpretation of the existing law, only the class

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168. *Id.* at 33.

169. CAL. CODE OF CIV. PROC. § 382 (West 2004).

170. *In re Tobacco II*, 207 P.3d at 33–34.

171. *Id.* at 34.

172. *See id.* (“Generally standing in a class action is assessed solely with respect to class representatives, not unnamed members of the class.” (quoting *In re Gen. Motors Corp. Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 310 (S.D. Ill. 2007))).

173. *See id.* at 35.

174. *See e.g.*, Kimberly A. Kralowec, *Another New Opinion Interpreting Tobacco II: Cohen v. DirecTV, Inc.*, THE UCL PRAC., <http://www.uclpractitioner.com/2009/10/another-new-opinion-interpreting-tobacco-ii-cohen-v-directv-inc.html> (last visited Oct. 21, 2010); Kimberly A. Kralowec, *Two More Articles on In Re Tobacco II*, THE UCL PRAC., <http://www.uclpractitioner.com/2009/10/two-more-articles-on-in-re-tobacco-ii.html> (last visited Oct. 21, 2010).

representative must successfully meet the new Proposition 64 standing requirements.<sup>175</sup> But a proposed class must still reach the class-certification stage.<sup>176</sup> In order to pass the hurdles of class certification, a proposed class must meet the statutory requirements imposed by section 382 of the California Civil Code of Procedure.<sup>177</sup> This section examines the mounting difficulties in certifying a UCL class in compliance with the court's current interpretation of the commonality requirement.

Section 382 imposes two requirements for class certification: the "existence of an ascertainable class" and "a well-defined community of interest in the question of law and fact involved."<sup>178</sup> The first inquiry—whether a class is ascertainable—is based on three factors: "(1) the class definition, (2) the size of the class, and (3) the means available for identifying the class members."<sup>179</sup> The second inquiry—whether there exists a community of interest—is based on three factors: "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representative who can adequately represent the class."<sup>180</sup> The community-of-interest requirement for class certification is most relevant to understanding the current trend in UCL class certification orders and denials.

Since the passage of Proposition 64, UCL plaintiffs have had difficulty certifying class actions as a result of courts' widespread denial of class certification for lack of commonality.<sup>181</sup> After *In re Tobacco II*, however, courts applied the California Supreme Court's interpretation that the new standing requirements applied only to the class representative.<sup>182</sup> Nevertheless, some courts continue to use earlier interpretations of the post-Proposition 64 UCL standing

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175. *In re Tobacco II*, 207 P.3d at 34.

176. *See id.* at 30.

177. CAL. CIV. PROC. CODE § 382 (West 2004).

178. *Vasquez v. Superior Ct.*, 484 P.2d 964, 969 (Cal. 1971).

179. *Reyes v. Bd. of Supervisors*, 242 Cal. Rptr. 339, 343 (Ct. App. 1987).

180. *Richmond v. Dart Indus., Inc.*, 629 P.2d 23, 28 (Cal. 1981).

181. *See generally* Linda S. Woolf, Managing Partner, Goodell, DeVries, Leech & Dann, LLP, Presentation at the FDCC Annual Meeting: Reliance Requirements in Consumer Fraud Class Actions: Courts Continue to Struggle to Strike the Proper Balance, 3 (July 26–Aug. 2, 2009) (transcript available at <http://www.thefederation.org/documents/document.cfm?DocumentID=2363>) ("Strict enforcement of reliance requirements for all class members makes certification virtually impossible.").

182. *In re Tobacco II Cases*, 207 P.3d 20, 31 (Cal. 2009).

requirements, denying class certification or decertifying previously certified classes on the grounds that individualized issues predominate.<sup>183</sup> And while *In re Tobacco II*'s progeny confirm that individualized proof of common injury is not necessary under Proposition 64,<sup>184</sup> some courts have continued to require such proof as part of the underlying prima facie case under the UCL.<sup>185</sup>

In granting or denying class certification, courts have focused on individualized issues with respect to whether a defendant has engaged in an unfair business practice. Further, courts have been careful not to decide the issue of commonality based on the injuries suffered by the consumer or purchaser.<sup>186</sup>

For example, in *Kaldenbach v. Mutual of Omaha Life Insurance Co.*,<sup>187</sup> the Fourth District Court of Appeal affirmed the decertification of a UCL class based on a lack of commonality.<sup>188</sup> Defendants argued that individual issues regarding whether there was an unfair business practice predominated, and the court agreed.<sup>189</sup>

However, upon a closer examination of the facts, the plaintiff made a credible argument for class certification based on the uniformly misleading sales and marketing practices the defendant

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183. See *Cohen v. DIRECTV, Inc.*, 101 Cal. Rptr. 3d 37, 49 (Ct. App. 2009) (affirming the trial court's denial of class certification of a proposed class of subscribers to DIRECTV's High Definition Package because the plaintiff could not show that common issues of law or fact would predominate, disregarding the California Supreme Court's *In re Tobacco II* interpretation of Proposition 64 as imposing injury-in-fact and reliance requirements only on the class representative).

184. See *Morgan v. AT&T Wireless Servs. Inc.*, 99 Cal. Rptr. 3d 768, 783 (Ct. App. 2009) (holding that pre-Proposition 64 case law describing the conduct outlawed under the UCL continues to apply after Proposition 64 and that "[t]he only difference is that, after Proposition 64, plaintiffs (but not absent class members in a class action) must establish that they meet the Proposition 64 standing requirements" (citing *In re Tobacco II*, 207 P.3d at 25)); see also THE BUREAU OF NATIONAL AFFAIRS, INC., CLASS ACTION LITIGATION, COURT APPLIES *TOBACCO II*: PROP 64 CHANGED STANDING REQUIREMENTS, NOT SUBSTANTIVE LAW 1 (Oct. 9, 2009) ("The appeals court [in *Morgan*] confirmed that although Proposition 64 altered the standing requirements for a UCL claim, it did not alter the substantive rules governing business and competitive conduct.").

185. See, e.g., *Kaldenbach v. Mut. of Omaha Life Ins. Co.*, 100 Cal. Rptr. 3d 637, 653 (Ct. App. 2009) (finding that the lower court did not abuse its discretion in concluding that individualized issues predominated where independent contractor agents sold "vanishing" life insurance products).

186. *Id.* at 652.

187. 100 Cal. Rptr. 3d 637.

188. *Id.* at 653.

189. *Id.*

employed.<sup>190</sup> The *Kaldenbach* case involved a plaintiff who alleged that “he was induced through improper and deceptive sales practices to purchase” the defendant’s “vanishing premium” life insurance plan.<sup>191</sup> Like most life insurance policies, that plan included a traditional annual-premium-payment component in which the policy holder makes cash payments to the insurer in exchange for a specified sum upon the policy holder’s death.<sup>192</sup> Unlike most other life insurance plans, the particular policy that Kaldenbach purchased also included an investment component wherein the insurer would invest Kaldenbach’s accumulated premium payments to generate a self-sustaining return.<sup>193</sup> In other words, after Kaldenbach spent a certain number of years paying a premium, the premiums were scheduled to “vanish,” and the investment returns would fund the life insurance policy until its maturity date.<sup>194</sup> After the insurance company notified him that the investment returns were insufficient to cover his premiums, Kaldenbach filed a UCL class action against the insurance company alleging that all sales of vanishing-premium policies were based on misleading sales presentations that omitted material facts.<sup>195</sup> His proposed class included Californians who purchased the same life insurance policy from Mutual of Omaha between December 31, 1995 and January 1, 1998.<sup>196</sup>

Ultimately, the court affirmed decertification because a variety of independent-contractor sales agents had sold the defendant’s insurance policies.<sup>197</sup> The court concluded that, in order to meet the commonality requirement for class certification, the plaintiffs had to prove that those sales representatives “took Mutual’s [life insurance sales] training, read its manuals, and routinely followed the training and materials.”<sup>198</sup> The plaintiffs also had to prove that the “materials, disclosures, representations, and explanations” given to purchasers were misleading in substantially the same way.<sup>199</sup>

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190. *See id.* at 649.

191. *Id.* at 641.

192. *See id.* at 640.

193. *See id.*

194. *Id.* at 640 n.1.

195. *Id.* at 641.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*



Here, the record reflects that Kaldenbach presented evidence of a truly misleading and deceptive business practice. Agents represented the vanishing premiums to consumers as self-fulfilling investments that required up-front premium payments in exchange for essentially free life insurance policies once the investment returns were applied.<sup>200</sup> While to some skeptics, and in light of the recent global financial downturn, the economics of such vanishing-premium policies might not make much economic sense,<sup>201</sup> this hindsight view should not have any bearing on the reasonableness of the consumer's reliance.

The reality, in this case, is that the policy was represented in this vanishing-premium manner to hundreds of Californians.<sup>202</sup> And although the concept of the vanishing-premium life insurance policy is precariously balanced on projected investment returns,<sup>203</sup> a reasonable consumer is not assumed to be overly financially savvy and therefore should not be expected to foresee an economic downturn where the instruments were paraded as safe and reliable. Instead, a reasonable consumer is likely to believe a well-presented sales pitch. The idea of a vanishing premium is likely to persuade a reasonable consumer that the policy would produce the advertised results. Thus, if this particular life insurance policy violates section 17200 or section 17500, the plaintiff is entitled to relief. Furthermore, if hundreds of similarly situated plaintiffs purchased the same vanishing-premium life insurance policies, they should be entitled to relief as well. It appears that the most efficient manner of adjudicating these claims—where the plaintiffs bought the same insurance policy from the same parent company—is the class-action vehicle. Consequently, construing the class certification requirements too strictly violates the policies underlying class actions and restricts access to justice for those plaintiffs who lack the knowledge or capital to would not independently initiate lawsuits but would benefit greatly from joining a class action.

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200. *Id.* at 640–41.

201. See Peter Katt, *Vanishing-Premium Policy Designs: The Good and the Bad*, AM. J. OF INDIVIDUAL INVESTORS, Feb. 1998, reprinted at Articles, KATT & COMPANY, at <http://www.peterkatt.com/articles/aaii17.html>.

202. *Kaldenbach*, 100 Cal. Rptr. 3d at 641.

203. See *id.* at 640.

*Kaldenbach* is significant for its illustration of UCL class-certification obstacles, and because it presents a particularly compelling example of where a more expansive definition of commonality or community of interest would benefit those consumers wishing to bring a UCL claim as a class.

V. CALIFORNIA COURTS SHOULD EVALUATE COMMONALITY OF  
DEFENDANT'S UNLAWFUL, UNFAIR, OR FRAUDULENT CONDUCT,  
NOT COMMONALITY OF CLASS-MEMBER RELIANCE

Of the elements necessary to establish a community of interest, the first requirement—that there be predominant common questions of law or fact—is of most interest in the UCL context.<sup>204</sup> This is because of the reality of changing, modern business practices that use new technologies and consequently affect individuals in increasingly different ways.<sup>205</sup> For example, outsourcing sales to independent contractors may eliminate one element of commonality if the independent sales representatives utilize different marketing materials or make unofficial representations about the product in their individual capacities.<sup>206</sup> This argument—that consumers receive the unfair, unlawful, or fraudulent product or practice through different channels—is one of several arguments UCL defendants

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204. Class certification requires both a showing of a community of interest among proposed class members and a presentation of an ascertainable class. CAL. CIV. PROC. CODE § 382 (West 2004). Since the community-of-interest inquiry is more extensive than identifying the ascertainable class, and because the community-of-interest inquiry has a corresponding three-element test, this class-certification requirement is of most interest to the forthcoming discussion. *See id.*

205. Advertisements reach consumers in a variety of different ways. *See generally* Knowledge@Wharton, *Technology Is Changing the Advertising Business*, CNET NEWS, (Feb. 3, 2001, 4:00 AM), <http://news.cnet.com/2100-1023-251882.html> (describing the creative advertising schemes born of technological advances). Condé Nast, a publisher of nineteen magazines, has already prepared digital magazines, which presumably will include advertisements, for use on Apple Computer's iPad. Stephanie Clifford, *Condé Nast Is Preparing iPad Versions of Some of Its Top Magazines*, N.Y. TIMES, Mar. 1, 2010, at B6.

Facebook, a social networking website, reserves the right to gather information from user profiles and to display advertisements targeted to Facebook users based on content the users display on their internet profiles. *See Facebook Ads-Optimization: Using the Insights Tool, Reaching Your Exact Audience, Writing Engaging Text*, FACEBOOK, 4 (May 27, 2008), [http://ads.ak.facebook.com/ads/FacebookAds/ad\\_optimization\\_final.pdf](http://ads.ak.facebook.com/ads/FacebookAds/ad_optimization_final.pdf) (illustrating the various filters available to advertisers, including targeting audiences based on geographic location, workplace, relationship status, age, gender, and any other keyword displayed on profiles).

206. *See, e.g., Kaldenbach*, 100 Cal. Rptr. 3d at 649.

have made to defeat class certification.<sup>207</sup> Prior to the *In re Tobacco II* decision, California courts tended to require a showing of commonality of class-member injury and reliance.<sup>208</sup> After the decision, courts trended toward requiring a showing of commonality with respect to the defendant's alleged wrongdoing.

Other than Proposition 64, the vast majority of law interpreting the UCL statutes is case law, so it is difficult to remedy the commonality issues through legislation. Additionally, Proposition 64 supporters might perceive a legislative remedy as contravening the people's vote. Instead, the change must come through a shift in judicial interpretation of the UCL class-certification requirements. Such a shift is necessary to accommodate changing business practices, new technologies, and increasingly scattered channels of advertising.

Because today's consumer marketing takes many different forms,<sup>209</sup> it has become increasingly difficult to argue that a particular business act or practice affected a certain (large) class of consumers in a substantially similar way without reducing the class size to a level that can be managed outside of the class-action vehicle.

For example, commercials and other representations of the function or quality of products may now reach consumers through different, and oftentimes variant, channels of distribution.<sup>210</sup> Print advertisements in newspapers and magazines, billboard advertisements, radio messages, video clip messages tacked on to the beginning of streaming internet videos, and banner ads on websites make up just some of the methods that manufacturers employ to introduce their products to consumers.<sup>211</sup> If one of these messages were found to violate the UCL, then a proposed class of plaintiffs would have to meet the burden of proving common issues of law or fact. To do so would presumably require the class members to have seen the same advertisement or substantially the same message; to have relied on that message in the same way; and to have been

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207. See *id.* at 643–45.

208. See *Cohen v. DIRECTV, Inc.*, 101 Cal. Rptr. 3d 37, 47–49 (holding that there was a lack of commonality of interest among the proposed class members and interpreting the California Supreme Court's decision in *In re Tobacco II* as addressing only procedural standing issues).

209. See Knowledge@Wharton, *supra* note 205.

210. *Id.*

211. *Id.*

affected by the false, unfair, fraudulent, or deceptive business act or advertisement in the same or a similar way.

But this analysis only considers one form of the commonality problem—the common receipt of information. The commonality issue raised by UCL class actions extends farther, reaching the individual plaintiff's proof of the existence of an unfair, unlawful, fraudulent, or deceptive business act or practice.

Further, traditional notions of commonality do not meet today's consumer-protection needs. As illustrated by the *Kaldenbach* case, even limiting the scope of the commonality question to whether the defendant committed an act or business practice prohibited by section 17200 or section 17500 is insufficient to satisfy class certification where there is a genuine showing of wrongdoing prohibited by the UCL.<sup>212</sup> The current notion of commonality must therefore undergo a revision to meet the modern aims of consumer protection.<sup>213</sup> Courts should apply a more flexible standard of commonality<sup>214</sup> in which deceptive business practices like those in *Kaldenbach* can be remedied through the class-action vehicle. This would serve the efficiency purpose underlying class actions by aggregating individual claims together in a coordinated lawsuit.

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212. See *Kaldenbach*, 100 Cal. Rptr. 3d at 653.

213. The FTC Bureau of Consumer Protection website identifies its consumer-protection goals as: protecting consumers from unfair, deceptive, or fraudulent business practices in the marketplace; educating consumers about their rights; and protecting consumers by enforcing federal truth-in-advertising laws, particularly those laws pertaining to food, drugs, and high-tech products. David Vladeck, *About the Bureau of Consumer Protection*, FED. TRADE COMM'N, <http://www.ftc.gov/bcp/about.shtm> (last visited Feb. 28, 2010).

214. Such a standard would shift focus to the unfair, unlawful, or fraudulent conduct of the defendant. It would also consider whether common issues of law or fact exist within the alleged wrongful conduct. This shift in focus would protect plaintiffs from class certification denials in cases where the defendant's unfair, unlawful, or fraudulent conduct clearly rises to a level actionable under the UCL and certifying a class would meet the underlying goals of class-action litigation. But where the dissemination or reach of the unfair, unlawful, or fraudulent conduct to members of the proposed class has an individualistic streak, like that of the subcontractors used by Mutual of Omaha Life Insurance, courts are more reluctant to certify a class. See *Kaldenbach*, 100 Cal. Rptr. 3d at 649. When deciding whether there exists sufficient commonality to certify a class, it is important for courts to balance the interests both ways. Simply because there are some differences in consumer receipt of unfair, unlawful, or fraudulent conduct should not serve to destroy class certification completely, particularly where the other factors weighing in favor of class certification are very high.

## VI. A BROADER CONSTRUCTION OF COMMONALITY WILL BENEFIT CONSUMERS AND ENSURE GREATER ACCESS TO JUSTICE

Expanding the definition of commonality would not only benefit those consumers wishing to aggregate their claims and shift case-management to the class representative, but it would also benefit UCL defendants by decreasing their litigation costs.<sup>215</sup> Redefining commonality to focus more on a defendant's unfair, unlawful, or fraudulent business practice would also increase the efficiency of the judicial process with respect to UCL claims. By certifying a class in situations where the court otherwise would have objected to class certification, defendants will avoid an onslaught of individual lawsuits against them and consolidate witness testimony and litigation of common issues into one action.

While a new approach to commonality, which weighs common issues of fact or law with respect to a defendant's conduct more heavily than individualized issues of receipt or impact on class members, may result in an increase of class-certification orders in UCL matters, such a result is not to be disfavored. Class actions, while complex, serve an important function in American civil litigation because they ensure more comprehensive access to justice for those class members that would not otherwise pursue their claims. Here, a broader definition of commonality would ensure that prospective UCL class-action members have the option of bundling their claims together and distributing the costs of litigation among themselves, promoting efficiency and removing the financial disincentive to litigating where the cost of individual litigation exceeds the damages for each class member.

Redefining commonality would also deter those defendants contemplating violating the UCL, because emphasizing a defendant's wrongdoing will likely make class certification easier. Once a class has been certified, the cost-benefit calculus for many defendants tilts in favor of an out-of-court settlement because losing to a class is usually more expensive than losing to a single plaintiff.<sup>216</sup> While this

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215. Where there are claims against a particular defendant in the order of hundreds or thousands, class actions create a more uniform litigation scheme and allow a defendant to resolve most or substantially all claims without the need to individually negotiate settlement agreements or independently defend each individual claim.

216. See Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1255 (2002).

increased pressure on defendants to settle is one undesired<sup>217</sup> effect of redefining commonality because it may cause some risk-averse defendants to settle unmeritorious cases against them, the overall effect would still benefit consumers and promote their access to justice because it would make class actions more accessible in cases where there is a legitimate predicate for a UCL violation. Courts' increased willingness to look to a defendant's alleged unfair, unlawful, or fraudulent business activities when considering commonality for class certification would encourage potential UCL violators to act with caution when engaging in business practices that could conceivably amount to unfair competition under California's UCL statutes. This is because defendants would recognize that the commonality barrier has become less ominous for UCL plaintiffs and prospective class members. The net effect would be to decrease the overall occurrence of business practices that harm consumers—whether causing harm to their health, like the alleged UCL violation in *In re Farm Raised Salmon Cases*,<sup>218</sup> or harm to their economic interests, like the alleged UCL violation in *Kaldenbach*.<sup>219</sup>

Lastly, redefining commonality to more heavily weigh the unfair, unlawful, or fraudulent conduct of defendants in class-certification determinations would better enable both public and private enforcement of the UCL. Revisiting the *Kaldenbach* case, an increased willingness to factor the defendant's allegedly fraudulent conduct into the commonality inquiry would likely result in a more favorable class-certification determination for the plaintiffs.<sup>220</sup> In that case, the life insurance policies all included the vanishing-premium

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217. This Note suggests that courts redefine commonality within the scope of class-certification determinations under sections 17200–17500 of the California Business and Professions Code by placing more emphasis on a finding of common issues of fact or law among a UCL defendant's unfair, unlawful, or fraudulent conduct. This Note does not encourage a shift in defining commonality for purposes of coercing UCL defendants into settlement. In reality, the costs of defending a class-action suit may be more than a defendant is willing to bear, based on the probability of success on the merits. In theory, however, this Note proceeds under the assumption that all class-action suits will continue through the litigation process. Under this assumption, shifting the definition of commonality to more heavily weigh a UCL defendant's wrongdoing will simply provide potential class members with the option of pursuing their claims more easily through the class-action vehicle, instead of leaving them to pursue independent claims for damages that might otherwise be nominal in relation to the time, money, and opportunity cost that goes into bringing an individual UCL suit against a business entity.

218. 175 P.3d 1170, 1173 (Cal. 2008).

219. 100 Cal. Rptr. 3d 637, 641 (Ct. App. 2009).

220. See *id.* at 652.

mechanism, and the underlying complaint was about the deceptive nature and representation of the premiums.<sup>221</sup> The court focused primarily on individualized receipt—that the policies were sold by subcontractors who probably represented the policies in varying ways—rather than on the common issues of fact or law.<sup>222</sup> Had the court focused on the policies' similarities, and their shared risks of a fluctuating market and nonguaranteed returns, it could have certified the class. Redefining commonality would likely produce a different class-certification result under the *Kaldenbach* facts. By certifying the *Kaldenbach* class, the court would have better served the interests of UCL plaintiffs and increased access to justice for those consumers wishing to join a class-action lawsuit instead of pursuing individual claims.

Likewise, the 2008 ARPS freeze plaintiffs would have benefited from a new approach to commonality.<sup>223</sup> Investors who purchased the ARPS based on broker representations that the securities were as liquid as savings accounts or money market accounts<sup>224</sup> could bring a consolidated UCL action against each bank for alleged UCL violations. Redefining commonality to emphasize the unfair, unlawful, and deceptive conduct of the banks and brokerage firms that sold the ARPS without disclosing the associated liquidity risks would allow investors to more easily meet class certification and bring a UCL class action to recoup their losses. While many ARPS investors who brought class actions against banks and brokers that sold them the ARPS under the guise of safe, liquid investments were unsuccessful at the class-certification stage,<sup>225</sup> banks eventually compensated some of them through settlements or by redeeming the ARPS at face value to appease angry investors.<sup>226</sup> The willingness of

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221. *Id.* at 641.

222. *Id.* at 652.

223. *See supra* Part III.A.

224. *See* Walter Hamilton et al., *Wells to Buy Back Frozen Securities*, L.A. TIMES, Nov. 19, 2009, at B1.

225. *See* Gretchen Morgenson, *A Way Out of the Deep Freeze*, N.Y. TIMES, Nov. 8, 2009, at BU1.

226. *See, e.g.*, Associated Press, *Bank of America, Accused of Misleading Customers, Agrees to Buy Back Securities*, N.Y. TIMES, Oct. 9, 2008, at A30; Associated Press, *Citigroup and UBS Agree to Buy Back Risky Securities*, N.Y. TIMES, Dec. 12, 2008 at B8; Justin Cole, *UBS Joins Citi, Merrill in Mass Buyback of Stressed Securities*, SYDNEY MORNING HERALD, Aug. 9, 2008, available at <http://news.smh.com.au/world/ubs-joins-citi-merrill-in-mass-buyback-of-stressed->

banks to compensate customers for ARPS losses without the need for litigation is a good thing. However, not all banks that sold ARPS agreed to redeem funds right away.<sup>227</sup> This not only exposed those institutions to liability, but also means that the commonality discussion is still very much relevant for ARPS investors. With a fresh perspective on commonality, these investors would be better equipped to bring UCL class actions against the remaining banks, and in doing so, they will more easily reach their day in court.

## VII. CONCLUSION

Although courts are still in the process of building the boundaries of Proposition 64 and *In re Tobacco II*, recent opinions suggest that courts are still struggling to formulate a clear standard for class certification of UCL claims.<sup>228</sup> In some cases where there is a credible argument that a defendant violated the UCL, courts deny class certification based on minute differences of fact.<sup>229</sup>

While the class-action vehicle is not to be abused, it is available to plaintiffs who suffer similar injuries for an important reason: plaintiffs who suffer relatively minimal individual damages, like some plaintiffs in the *Cohen* case,<sup>230</sup> lack incentive to litigate because the cost of litigation exceeds the value of the possible judgment. But in the aggregate, the damage from a defendant's unlawful conduct is a harm that should not go unremedied because individual damages, multiplied across the spectrum of injured plaintiffs, produce a substantial injury to the whole of the potential class. Therefore, courts must recognize that redefining commonality for the UCL-litigation niche would serve the important goal of putting the class-action vehicle to its intended use, while simultaneously producing procompetitive benefits and increasing access to justice for similarly situated plaintiffs.

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securities-20080809-3si3.html; Cyrus Sanati, *Wells Fargo to Repurchase \$1.4 Billion of Securities*, N.Y. TIMES, Nov. 19, 2009, at B8.

227. In September 2010, the first ARPS class-action complaint survived past the complaint stage. The lawsuit names Raymond James brokerage firm as the defendant. Bloomberg, *Raymond James Auction-Rate Suit Is First to Be Upheld*, INVESTMENTNEWS, Sept. 9, 2010.

228. See *Cohen v. DIRECTV, Inc.*, 101 Cal. Rptr. 3d 37, 47 (Ct. App. 2009) (affirming the denial of class certification of a proposed class of subscribers of DIRECTV's High Definition Package for high-definition television based on their finding that the plaintiff could not show that common issues of law or fact would predominate).

229. See *supra* Part III.A.1.

230. See *Cohen*, 101 Cal. Rptr. 3d at 39–40.



